



# MENTAL CAPACITY ACT (MCA) POLICY

## 1. Introduction

The Mental Capacity Act 2005 became fully effective in October 2007 in England & Wales. It is a means by which patients' abilities to make an informed decision are measured and as such it protects patient and practitioner and removes indecision and ambiguity about choices of care.

The MCA applies to those individuals with impaired cognitive function applicable to making informed decisions or who deal with individuals who may lack mental capacity. Within primary care, use of the MCA is applicable to GPs, nurses and those to whom referrals may be made

## 2. Scope

It is not within the scope of this policy document to provide full clinical guidance on the assessment of capacity, although an overview is provided and a checklist included in the appendix.

The policy defines mental capacity in the context of decision-making, using the five core principles of the MCA; it provides guidance on documentation and the role of the Independent Mental Capacity Advocate (IMCA) is discussed.

The Mental Capacity Act (MCA) does not generally apply to young persons under the age of 16 – a parent or guardian can normally make decisions on their behalf – however under some circumstances a Court of Protection may make decisions on their behalf.

This policy should be considered in conjunction with the resources listed below and is applicable to all clinical staff employed by The Surgery.

## 3. Policy

Mental capacity in this context is the ability of a patient to consider all the information provided and, using intellect, maturity and life experience, make an informed decision. Lack of capacity may be permanent, temporary or fluctuating, depending on physical and mental causes and on environmental factors.

The MCA is governed by five core principles:

1. A person is assumed to have capacity until it is proven that they lack it;
2. A person is not to be treated as unable to make a decision unless all practicable steps have been taken to help them do so, without success;
3. A person is not to be treated as unable to make a decision merely because they have made an unwise decision;
4. An act or decision undertaken on behalf of an individual who lacks capacity must be in that individual's best interests.
5. Prior to an act or a decision under the MCA, due regard must be taken as to whether the purpose for which the decision is needed, can be achieved in an alternative manner that is less restrictive of the individual's rights or freedom of action.

## Mental Capacity Assessment

In the event that concerns are raised regarding the patient's mental capacity, the Official Code of Practice provides for a 2 stage question test to assess capacity (see also notes below applicable to assessment).

**Q** Is there an impairment of, or disturbance to, the functioning of the person's mind or brain?

**Q** If so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

Consideration must be given to:

- Whether the patient is able to understand the information given to him;
- Whether he is able to retain this information;
- Whether he is able to assess this information whilst reaching a decision;
- Whether he is able to communicate his decision using any effective means.

This test must be used and the records must record that this assessment has occurred and include the responses.

Where the person is unable to do **any one** of the above they are unable to make the decision themselves.

The Code of Practice also provides a further 6 questions to aid in the assessment process:

Does the person have a general understanding of what decision he needs to make and why he needs to make it?

Does he understand the consequences of making or not making the decision, or of deciding one way or the other?

Is he able to understand the information relevant to the decision?

Can he weigh-up the relative importance of the information?

Can he use and retain the information as part of the decision-making process?

Can he communicate the decision?

\*See Appendix for checklist

In making an assessment, there are some important considerations; the practice will:

- Provide the patient with all necessary information, including the consequences of making or not making a decision;
- Provide information on all available options;
- Consult with family members;

- Take into account ethnic, cultural and personal preferences where known;
- Select the location for the assessment carefully, with consideration for the patient, to ensure that he is at ease and comfortable in the surroundings;
- Pitch the consultation to the needs and level which suit the patient best;
- Assess the patient at his best level of functioning.

The practice will also consider:

- Intellectual ability;
- Memory;
- Attention / concentration;
- Reasoning;
- Understanding;
- Ability to communicate

#### **4. Documentation**

In normal consultations there is the assumption of capacity unless there is evidence to suggest that capacity may be compromised (principle 1). Doubt may arise from unusual behaviour exhibited by the patient or from concerns or comments made by family members / carers. Clinical staff will, in the normal course of care, make decisions regarding capacity and the patient's ability to consent to the treatment proposed.

All clinical staff will maintain a record within the clinical system of any long-term or significant plans relating to their patients and documentation will include decisions or considerations made in respect of patient's capacity.

When making a record relating to capacity the record will include as a minimum:

- Why a particular decision has been made;
- What information was used to inform the decision;
- What was the process in arriving at the decision - other staff involved, consultations, family involvement, referrals, etc;
- Whether a formal assessment was undertaken to guide practice; include responses and outcomes and document any consultations with family members and / or other clinical members of staff.

The purpose of a full record and audit trail relating to both the individual decision and the full cycle of care may be required if the clinician needs in the future to justify (legally, professionally or ethically) the processes or the actions taken.

## 5. Principles of Best Interest

“Best interest” is not defined and the clinician must be careful not to make assumptions and judgements of best interest based on the patient’s age, appearance, behaviour etc. Reference must be made to any written instructions which exist already (e.g. Advance Directives).

The clinician should incorporate the views of family and carers and involve the person where possible in informing decisions about care and should assess whether the decision can be deferred if the person is likely to regain capacity.

The clinician must document the assessment processes and reasons for invoking best interests; he / she should consider taking the least restrictive alternative.

## 6. Advance Directives

Advance Directives (Living Wills) allow an adult with capacity to make provision for a time when he may lose capacity. A properly constructed Advance Directive is as valid as a current decision BUT if it involves the refusal of life-sustaining treatment it must include the phrase “**even where life is at risk**”, be written, signed, dated and witnessed.

Advance Directives addressing defined but more minor impacts may be verbal though preferably witnessed by a third party. The patient’s wishes will be documented in his record.

See the Advance Directives Policy for more comprehensive information.

A Lasting Power of Attorney will overrule an Advance Directive if made at a later date; it gives an attorney the right to consent or refuse treatment. An Advance Directive decision will also be withdrawn if the person subsequently did something inconsistent with it.

See also Powers of Attorney

## 7. Independent Mental Capacity Advocates (IMCAs)

An IMCA provides an independent service that safeguards people who lack capacity but have no-one else to make decisions for them or support them (other than paid persons). An IMCA must be involved when any of the criteria below apply:

- An NHS organisation is proposing the provision of serious medical treatment, or
- An NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home and
- The individual will stay in hospital longer than 28 days or in the care home for more than eight weeks.

An IMCA may be instructed to support someone who lacks capacity to make decisions concerning:

- Care reviews, where no-one else is available to be consulted;
- Adult safeguarding (protection) issues, whether or not family, friends or others are involved

In England, IMCA services are delivered through local authorities, working in partnership with the NHS. Local authorities or NHS organisations are responsible for instructing an IMCA to represent an individual who lacks capacity; in these circumstances the organisations are called the 'responsible body'.

With regard to decisions about serious medical treatment, the responsible body will be the NHS organisation providing the person's healthcare or treatment. Examples of serious treatment (amongst others) may be:

- Chemotherapy and / or surgery for cancer;
- Electro-convulsive therapy (ECT);
- Therapeutic sterilization;
- Major surgery (such as open-heart surgery or brain/neuro-surgery) or major amputations (for example, loss of an arm or leg);
- Treatments which will result in permanent loss of hearing or sight;
- Withholding or stopping artificial nutrition and hydration
- Terminations of pregnancy.

For decisions about admission to accommodation in hospital for 28 days or more, the responsible body will be the NHS body that manages the hospital.

From 1<sup>st</sup> April 2007, NHS staff, for example doctors or consultants (the "decision makers") all have a duty, under the Mental Capacity Act, to instruct an IMCA where the eligibility criteria apply.

The "decision-maker" is the person who is proposing to take an action in relation to the care or treatment of an adult who lacks capacity, or who is contemplating making a decision on behalf of that person. Who the decision-maker is will depend on the person's circumstances and the type of decision to be made. For example, the decision-maker may be a care manager or a hospital consultant.

Staff working in statutory organisations, in the local authority or NHS and who are involved in making best interests decisions should know when an individual has the right of access to an IMCA and understand their duties and responsibilities in instructing an IMCA.

This duty may fall on GPs from time to time.

Practices are recommended to research the local method of referral to IMCAs through the Patient Advice and Liaison Service (PALS) operating within their commissioning area.

Contacts

### **Contacts**

**IMCA - Skills for People - 0191 281 7322**

**Adult Safeguarding - Social Care Direct 03000 26 79 79**

**ASSESSMENT OF CAPACITY CHECKLIST**

<b>QUESTION:</b>	<p>Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?</p> <p>If so, is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?</p>	
<b>CONSIDER:</b>	<p>Whether they are able to understand the information given to them</p> <p>Whether they are able to retain this information</p> <p>Whether they are able to assess this information whilst reaching a decision</p> <p>Whether they are able to communicate their decision using any effective means</p> <p>Consulting with family members</p> <p>Ethnic or personal preferences where known</p> <p>Consulting when the patient is at their best level of functioning</p> <p>Intellectual ability</p> <p>Memory</p> <p>Attention / concentration</p> <p>Reasoning</p> <p>Understanding</p> <p>Ability to communicate</p>	
<b>PROVIDE:</b>	<p>All necessary information, including the consequences of making or not making a decision</p> <p>Information on all available options</p> <p>A location with consideration for the patient, to ensure that the patient is at ease and comfortable in the surroundings</p> <p>A level of consultation to the needs of the patient</p>	